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Nos. 88-515 and 88-525

In the Supreme Court of the United States

October Term, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT/CROSS-APPELLEE

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QUESTIONS PRESENTED

This case involves the constitutionality of a federal statute, § 223(b) of the Communications Act of 1934, as amended (47 U.S.C. § 223(b)), which imposes substantial criminal penalties upon anyone making either an "obscene" or an "indecent" interstate communication by telephone for commercial purposes.

The consolidated appeal and cross-appeal present the following questions:

1. Does § 223(b) unconstitutionally abridge freedom of speech by criminalizing the interstate transmission of all "indecent" telephone messages, including the non-obscene, to adults who have chosen to hear such speech?

2. Is § 223(b)'s standard for criminalizing "indecent" telephone messages unconstitutionally vague?

3. Where a sender of frankly sexual messages wishes to make them available only to communities where the messages are not regarded as obscene, but is denied this control by Congress' failure to require telephone companies to make such screening possible for the message senders, does § 223(b)'s ban on "obscene" interstate telephone communication:

(a) impose a content-based condition on the use of telephone services that advances no legitimate purpose?

(b) necessitate the use of a single, "national" standard for obscenity that conflicts with *Miller v. California*, calls for delicate policy judgments beyond the province of the federal courts, and intrudes on values of state and local autonomy?

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STATEMENT OF THE CASE

Sable challenges § 223(b) of the Communications Act of 1934, 47 U.S.C. § 223(b), as amended ("§ 223(b)"), because it indiscriminately prohibits the transmission by telephone of constitutionally protected, non-obscene speech, in derogation of the rights of consenting adults to hear such speech; because the statute fails to define what speech is proscribed in terms which give fair notice to those who must conform to it or reasonable guidance to those who must enforce its substantial criminal penalties; and because the statute's proscription of obscene telephone programs is not tailored to conform to the mandate of *Miller v. California*, 413 U.S. 15 (1973), that the standards of the community to which a publication is directed, as applied by that community, are to govern prosecution.

The Operation of Sable Communications, Inc.

Sable Communications, Inc., is a California corporation with an office in Los Angeles. Since 1983 Sable or its affiliates have offered adult-oriented recorded messages in the Los Angeles area code (213) through the Pacific Bell telephone network. Sable's messages have spanned the spectrum from suggestive double-entendre and fantasy encounters involving non-explicit descriptions of kissing and embracing, to some messages that are frankly sexual. Like most telephone companies—both the Bell Operating Companies spun off through the break-up of the AT&T telephone monopoly and the other "local exchange carriers" (LECs)—Pacific Bell maintains a dedicated two-way system known as the 976 Information Access Service ("976") that allows numerous callers to access simultaneously a specific seven-digit telephone number for the purpose of listening to a wide variety of pre-recorded messages.[1] Callers to such numbers are charged a fee

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1. The system in issue here is but one variation of a virtually unlimited number of computerized information storage and retrieval systems employing audio, video, and computer inter-

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by Pacific Bell which is then divided between the phone company and the message provider, such as Sable.

The means to limit a 976 message provider's lines to callers from the targeted local area lie entirely in the hands of the message provider's local exchange carrier. Various technologies such as centralized exchange blocking exist to ensure that only those in targeted areas can access such messages. For example, providers of adult messages can be assigned by the local phone company to a secured telephone exchange, in which customers of that phone company must notify the company in writing if they wish to have the particular exchange unblocked.[2] It is then a simple matter for the phone company to refuse unblocking for customers in regions that a given message-sender does not wish to reach. At present, Pacific Bell employs no technology to prevent callers outside the local area code from accessing Pacific Bell's 976 message services. Federal law leaves the local exchange carriers and their state regulators entirely free to decline all use of such technology—even where, as here, the result is that message providers such as Sable receive no revenue for many of the long-distance calls they are forced to accept, because the entire fee charged to the caller is retained by Pacific Bell and the interstate telephone carrier.

The upshot of this legal arrangement is that, although Sable designs and intends its messages exclusively for the entertainment of adults within the local area code who desire to hear them and does not seek access by callers out-

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action. While "976" is perhaps the most commonly discussed information access service, the same technology and the same telephone lines are currently used for such diverse services as LEXIS, WESTLAW, other computer data bases, electronic publishing, credit card billing confirmation, electronic banking, airline reservations systems, telemarketing, voice storage and retrieval, and electronic mail, among others. *See The Geodesic Network, 1987 Report on Competition in the Telephone Industry*, U.S. Department of Justice (January 1987) at 1.23-1.30.

2. *See Fabulous Associates v. Penn. Public Utility Comm'n*, 693 F.Supp. 332, 339 (E.D.Pa. 1988).

side the local community, it cannot prevent such access. Its only choice, if it wishes to avoid prosecution and conviction in areas where some of its adult messages would be deemed obscene, is to refrain from providing those messages to areas where they would be fully protected and indeed welcomed.[3]

There is no dispute that Sable has always conducted responsible advertising campaigns aimed only at consenting adults. Despite the Government's innuendo (GB 6-7, 28), Sable has never engaged in such practices as leafletting cars or homes, and has never provided the perverse sorts of messages that "Sable's affiliate" (GB 6) produced in 1983 and has never provided since.[4] Sable's 976 numbers are advertised exclusively in adult magazines that are not offered for sale to minors. Sable's pre-recorded messages are not broadcast; they are replayed electronically only in response to phone calls to its 976 numbers, and therefore raise no spectre of a captive audience or of unwanted intrusion into either public life or private homes.

The Genesis and Development of § 223(b)

Sable's facial challenge to § 223(b) does not in itself require inquiry into the legislative process behind the statute. However, since the Government seeks to justify § 223(b)'s ban on what the Government concedes is constitutionally protected speech by reference to Congress' sup-

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3. Of the calls to Sable's New York affiliate, Carlin Communications, Inc., in 1983 and 1984, eighty percent were local and twenty percent long distance. *Carlin Communications v. F.C.C.*, 749 F.2d 113, 115 (2d Cir. 1984).

The threat is quite real that federal prosecutors will journey to the areas of the country with standards least tolerant of adult materials and prosecute message senders there regardless of their attempts to avoid receiving calls from these areas. That threat is borne out by the record of federal prosecutions (brought under statutory regimes preceding the current § 223(b)), based on calls made from Utah to firms in New York and California which had carefully sought to avoid any operations in that state. *See Hearings, infra* note 5, at 215-16 (statement of Brent Ward for the Department of Justice).

4. Even during that brief period, only a handful of the thousands of messages offered by that company contained such extreme material.

posed "findings" about "dial-a-porn", we direct the Court's attention to certain matters omitted from the Government's account of § 223(b).

With the advent of adult telephone services in the early 1980's, Congress became concerned with how an accommodation could be reached between the rights of adults to hear such protected speech and regulations reasonably designed to help parents control access by minors. As a result, Congress created a statutory structure to prohibit obscene or indecent interstate communication for commercial purposes to any person under the age of 18, while giving an absolute defense to providers if they followed FCC regulations for restricting minors' access. In instructing the FCC to devise such "safe harbors," Congress was sensitive to the demands of the First Amendment, as indicated by the comments of § 223(b)'s cosponsor, Representative Kastenmeier:

> Congress intends that the FCC promulgate reasonable time, place, and manner restrictions calculated to restrict access to prohibited communications by persons under 18 years of age.
>
> Under the Supreme Court's holding in *Butler v. Michigan*, 352 U.S. 380 (1957), Congress cannot expect the FCC to impose blanket restrictions on dial-a-porn services if time, place, and manner restrictions are technically infeasible or impracticable. In *Butler*, the Supreme Court struck down as unconstitutional a statute that had the effect of preventing adults from having access to materials judged to have a potentially deleterious influence on children. *Id.* at 382-83. The Court explained that the statute would have reduced the adult population to reading only what was fit for a child. *Id.* at 383. The principle is equally applicable here, and so we have carefully constructed § 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. We leave it to the FCC to prescribe the specific regulations that permit adult access while limiting children's access. If, however, no such regulations are feasible, then less restrictive measures rather than broader re-

> strictions will have to suffice to avoid any constitutional infirmity.

129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983).

The FCC initially tried to satisfy the First Amendment concerns endorsed by Congress in enacting § 223(b) by creating a defense to prosecution if the message provider either operated solely between 9:00 p.m. and 8:00 a.m. Eastern Time or required payment by credit card prior to transmission of its messages. *Report and Order*, 49 Fed. Reg. 24,996 (1984). In *Carlin Communications, Inc. v. FCC* (*Carlin I*), 749 F.2d 113 (2d Cir. 1984), a unanimous panel of the Second Circuit Court of Appeals set the regulation aside, noting that it did not "warrant the special treatment that the [Supreme] Court has espoused in some contexts," such as media broadcasts. *Id.* at 120. "The regulation concerns a telephone service that requires dialing on the part of the would-be listener, as opposed to a public display, an unsolicited mailing, or other means of expression as to which the receiver has no chance to withhold his or her consent." *Id.* at 120. The court held that "the FCC has failed adequately to demonstrate that the regulatory scheme is well tailored to its ends or that those ends could not be met by less drastic means." *Id.* at 121. The court was also concerned that the FCC had not fully explored reasonable technological alternatives for blocking and screening that would be "less restrictive of adults' freedom to hear what they want when they want to hear it." *Id.* at 122.

Thereafter, the FCC adopted its *Second Report and Order*, 50 Fed. Reg. 42,699 (1985), promulgating revised regulations which maintained the credit card payment defense but substituted an authorized access or identification code for the previous time-of-day defense. These regulations, the FCC concluded, offered "the most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages." *Id.* at 42,706 n. 54.

In *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (*Carlin II*), the Court of Appeals again

set aside the FCC's regulations, but only as applied to message providers in the New York telephone system, which was not then configured to permit the interactive communication needed to process credit card or access numbers. The court noted in particular the FCC's failure to consider fully customer premises blocking (with costs to be borne by message providers):

> On the record before us, it may well be that the least restrictive means for complying with the congressional mandate lies in this now plainly feasible device available from various manufacturers.

Id. at 855.

In May, 1987, the FCC issued its *Third Report and Order*, 52 Fed. Reg. 17,760 (1987), establishing a defense to prosecution if the message provider required payment by credit card, required an access code, or scrambled its messages so that receipt would require a home descrambling device. The Court of Appeals upheld these regulations in *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*), *cert. denied*, 109 S.Ct. 305 (1988). The Court of Appeals summarized its extensive review of the record developed in the FCC proceedings, and the FCC's findings thereon:

> As a preliminary matter, we find that the record supports the FCC's conclusion that a scheme involving access codes, scrambling, and credit card payment is a feasible and effective way to serve this compelling state interest.

837 F.2d at 555.

The court concluded that the regulations did not unreasonably restrict adult access to protected speech, comparing them to the use of "blinder racks," sealed wrappers and adults-only sections in bookstores for sexually oriented materials. The court also upheld the FCC's rejection of alternative proposals and directed the FCC to continue to investigate new technologies:

> When [a beep-tone] device or any other less restrictive technology becomes available, we direct the FCC

> to reopen its proceedings to consider the costs and benefits of adding its use as an optional defense. In this way, the Government can fulfill its 'heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.' *Carlin I*, 749 F.2d at 121.

Id. at 556.

The Court of Appeals then considered whether § 223 (b)'s use of "obscene or indecent" was, as contended, vague and overbroad. Assuming that Congress intended "indecent" to be interpreted as defined in *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978), the court found that telephone calls over a private line differed "significantly" from a public broadcast, and that the *Pacifica* decision justified neither the regulation of indecent telephone messages nor a criminal prosecution. *Id.* at 560. Accordingly,

> Were the term "indecent" to be given a meaning other than *Miller* obscenity, we believe the statute would be unconstitutional.

Id. Unable to resolve conclusively what Congress had intended, the court held that the words "or indecent" were in any event severable and that the statutory prohibition of obscene speech, as severed, was constitutional. *Id.* at 561.

On September 30, 1987, after *Carlin III* had been argued but before the Second Circuit had issued its opinion, the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce of the House of Representatives convened a hearing[5] on proposed amendments to § 223(b) that would "eliminate completely so-called dial-a-porn operations . . . ." 133 Cong. Rec. S16794 (daily ed. Dec. 1, 1987) (statement of Sen. Helms.)[6]

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5. *See Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) (hereafter *Hearings*).

6. H.R. 1786 was originally introduced by Representative Bliley in March, 1985, prior to *Carlin II*. An identical measure was subsequently introduced in the Senate in December, 1987 by Senator Helms.

The Subcommittee was gravely concerned with the constitutionality of a total ban on "indecent" telephone communications.[7] Its concerns were echoed in the testimony of Diane S. Killory, the FCC's General Counsel:

> Because H.R. 1786 attempts to ban the dissemination of indecent communications to all persons, including consenting adults, there may be serious problems in sustaining the constitutionality of such legislation. Let me suggest a perhaps more legally sustainable approach: Obscene interstate transmissions would be prohibited outright; but essentially the current scheme as to indecent messages—by which minors' access is restricted—would be retained.

Hearings at 213 (statement of Diane S. Killory, General Counsel, FCC).

To the same effect was the prepared testimony of United States Attorney Brent Ward, speaking "on behalf of the Department of Justice":

> In our view H.R. 1786 would impose an undue burden on protected speech because it would prohibit indecent 'dial-a-porn' messages outright, without any allowance for the right of adults to have access to such messages. Therefore, we recommend that appropriate time, place or manner restrictions, such as the access code rule adopted by the FCC, be retained in the law, but be applicable to the communication of indecency only.

Hearings at 224.

The Department also stressed that such restrictions would be effective in dealing with the problem of minors accessing adult messages:

> MR. NIELSON. Let me ask the question I asked the previous panel. Do any of the current alternatives by the FCC—that is the access codes, the credit cards, or the scrambling—do any of those provide a foolproof way of limiting dial-a-porn access to adults only?

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7. *See, e.g., Hearings* at 2 (Statement of Chairman Markey); *id.* at 19 (Statement of Rep. Richardson).

> MR. WARD. I think that—it's not foolproof, but I think the access code requirement and the screening option, both provide the means of dramatically reducing the number of calls from minors in the United States, almost eliminating them. So I think that it would be a very effective way to do it.

Hearings at 231.

The hearing lasted only three hours, and little if any actual *evidence* was presented on the nature of the underlying problem.[8] The paucity of evidence, testimonial or otherwise, is underscored by the fact that the Government is unable to cite to any evidence or findings and must rely solely on the conclusory statements of § 223(b)'s supporters in Congress. (GB 13, 31). Nor did the Subcommittee receive evidence testifying to the alleged insufficiency of the technological solutions which the FCC had in fact found to represent a feasible and minimally restrictive means to achieve the governmental interest.[9] Among the few genuine facts adduced was one offered by the FCC:

> Since September 1985 the Commission has received about 310 written complaints relating to the inter-

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8. Second- and third-hand stories recounting instances of minors gaining access to adult messages were presented to the Subcommittee. Several are noted in the Government's Brief. Characteristic of the evidentiary basis for Congress' "findings" is a purported transcript, presented as an appendix to a legal memorandum attached to the prepared unsworn statement of a representative of Citizens for Decency Through Law, of an interview between a representative of that organization and the mother of the caller, a mentally-retarded adult. *Hearings* at 91-95.

9. Mr. Helgeson of NYNEX Corp. did *not*, as stated in the Government's Brief (p. 13), testify that central office blocking would cost $35,000,000 for New York alone. He stated that NYNEX's "original estimates" were in that range, that central office blocking would be relatively simple with newer equipment and that he had no current cost information. *Hearings* at 116-117. He nevertheless advocated blocking, as well as scrambling and the use of "PIN" numbers. *Hearings* at 133.

> state transmission of adult messages. During this same period, the Commission Common Carrier Bureau received a total of about 12,000 complaints on all telephone issues. The lion's share of those relate to billing disputes and other complaints against common carriers. Of the 310 complaints relating to dial-a-porn, about 90% are general complaints about the existence of adult message services, which do not present any specific facts or alleged violations of Section 223 which we can investigate.

Hearings at 208-09.

There was concurrence on all sides that deference to First Amendment principles through enforcement of the regulations already promulgated by the FCC was the appropriate course of action.[10]

Members of the Subcommittee were plainly frustrated with the judicial process which had delayed enforcement of the statute,[11] and only the most cursory attention was

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10. *Hearings* at 129-131 (Helgeson (NYNEX) advocating a "Chinese menu" method; Vander Ark (Michigan Decency Action Council, Inc.), "I believe the access code and scrambling probably offer the best possibilities, if they are rigidly enforced, but I would have to agree with Mr. Helgeson, I don't think they have been tried"; Swindell (Citizens for Decency Through Law, Inc.):

> "Mr. NIELSON. But neither of you are willing to make a blanket ban on indecent communication per se?
>
> Mr. SWINDELL. Not any more than any Congressman or Senator is willing to make a blanket thing on any of the hearings I have been hearing for the last 2 weeks, Mr. Congressman.")

See also statements of Department of Justice and FCC, *supra*.

11. "In the face of the FCC's—thus far—unsuccessful attempt to design an appropriate regulatory framework, H.R. 1786 seeks to make illegal all commercial provision of obscene or indecent telephone speech," *Hearings* at 2 (statement of Chairman Markey); "Twice the FCC has tried to make rules that permit access to dial-a-porn by adults only: Twice they have been rejected by the courts. While the FCC is now trying again, we cannot be optimistic that the third time will be a charm." *Id.* at 28 (statement of Representative Rinaldo); "Mr. NIELSON. Do you believe Mr. Helgesen, that we should have FCC pursue all of the

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paid to the questions whether, and to what extent, the FCC's regulations then under review by the Second Circuit in *Carlin III* would limit minors' access to adult messages. But, as noted, virtually all of the comments received favored testing those regulations prior to any amendment of § 223(b). Congress nevertheless rejected the counsel of the FCC, the Justice Department, and its other witnesses and proceeded to amend § 223(b) in April of 1988 to eliminate the FCC's regulatory function and to forbid all obscene or indecent commercial communication by telephone to any person regardless of age.[12]

Proceedings Below

Sable sought declaratory and injunctive relief against § 223(b) in the Central District of California on the grounds that the statute is unconstitutionally overbroad and vague and that it creates an impermissible national standard of obscenity. JS(88-515) F5-F6. The district court entered a preliminary injunction enjoining enforcement of § 223(b) against any allegedly indecent communications but severed that portion from the remainder of the statute and sustained the prohibition of obscene communi-

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different remedies before Congress acts on this issue? They have tried three things, none of which have worked. Shall we continue with FCC trying more and more things before we act, so that you can be protected in your own business?" *Id.* at 129; "I also think that it is important that we note that the FCC, the Federal Communications Commission, has attempted to address this issue, but obviously has little ability to do so, without some change in the statute." *Id.* at 19 (statement of co-sponsor Representative Tauke).

12. Prohibitions against indecent messages and obscene messages are now separately treated, thus mooting Sable's contention that the statute's ban on "obscene or indecent" communications (JS(88-515) 16-17) was not severable. The balance of the statute, and its impact upon Sable's First Amendment rights, are substantially unaltered. Sable's appeal is accordingly not moot. The FCC remains empowered, under 47 U.S.C. §§ 503(b)(1) and (2), to assess civil forfeitures for "willful or repeated" violations of § 223(b).

cations. JS(88-515) A1-A5. This appeal and cross-appeal followed.

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SUMMARY OF ARGUMENT

More than 30 years ago, in a decision that recognized the fundamental role played in our constitutional order by the twin principles of free speech for adults and parental control for children, this Court invalidated a statute barring the introduction "into any family, school or place of education" of any book, magazine, picture, or recording containing "obscene, immoral, lewd or lascivious" language or material. *Butler v. Michigan,* 352 U.S. 380, 381, 383 (1957). As Justice Frankfurter wrote for a unanimous Court, purging an entire medium of protected speech that is "not too rugged for grown men and women in order to shield juvenile innocence . . . is to burn the house to roast the pig." *Id.* No Justice dissented when this Court applied *Butler* a quarter of a century later to strike down an Act of Congress prohibiting the mailing of unsolicited advertisements for contraceptives—condom ads that some parents might deem "indecent" for their young children to see and read. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983). "The level of discourse reaching a mailbox," Justice Marshall wrote for the Court, "simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74; *accord id.* at 78-80 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).

With the advent in the early 1980s of adult telephone services, there arose a new but not altogether different arena in which our society's capacity to preserve parental control without sacrificing freedom of speech has been put to the test.

In 1988, Congress abruptly jettisoned a half-decade of efforts by the FCC and the courts to accommodate the rights of adults to seek out and listen in the privacy of their homes to sexually suggestive or explicit messages de-

signed for them and directed to them, and the rights and responsibilities of parents to determine what sorts of things their children should be able to hear. Prior regulations had been characterized by a narrow focus and a decentralized approach—banning interstate communication to minors of obscene and indecent materials, but only where providers failed to follow the FCC's various time, place, and manner rules designed to facilitate family-by-family blocking-out of messages that parents, and not the federal government, deemed unsuitable for their children.

Despite the FCC's 1987 conclusion that it had arrived at an effective combination of technological and regulatory means for restricting parentally unauthorized access by minors without unduly impairing the free speech rights of adults, and despite the lack of any evidence or finding that the FCC was wrong, Congress last year upped the ante by changing the goal. Impatient with more measured steps, Congress decided to demand a solution so child-proof that *no* minor, however enterprising, could *ever* break through and hear an obscene or indecent message. That impossible goal yields no limiting principle and produced the quite limitless statute at issue in this case—a flat ban on all interstate telephone communication, for commercial purposes, of "obscene" or "indecent" messages.

In *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), this Court upheld federal regulatory authority to assist parents in controlling their children's exposure to sexually suggestive or "dirty" words on daytime radio. The Court stressed that it was approving no around-the-clock ban on all such talk even on the radio, a medium the Court recognized as uniquely subject to regulation. And even the Government concedes that *Pacifica* is not authority for a flat ban, and especially a criminal prohibition, on all "obscene" or "indecent" interstate telephone communications, particularly those deliberately initiated by listeners knowledgeable about how to access such messages.

Such a ban is fatally overbroad: much of what it outlaws is fully protected speech, and there are less restrictive

means for helping parents control their children. That those means are not totally fail-safe is true but immaterial. That is the nature of law, and accepting the Government's unattainable standard of perfection would doom the First Amendment by reducing the adult population to hearing, seeing, and reading "only what is fit for children." *Butler*, 352 U.S. at 383. The ban is also fatally vague: indecency, like beauty, is in the eye of the beholder; as a standard for defining crime, it is more a question than an answer.

To the extent that it struck down the indecency ban, the district court's judgment should therefore be upheld. But it should be reversed to the extent that it sustained the obscenity ban. For, unlike a federal ban on interstate *mailing* of obscene materials, which may be enforced, as contemplated in *Miller v. California*, 413 U.S. 15, 30-32, 36-37 (1973), by applying local criteria of patent offensiveness and unacceptably prurient appeal, a federal ban on interstate *telephone* talk that is "obscene" cannot be enforced in this decentralized manner unless all of the relevant telephone companies take steps to make telephonic communications as geographically targetable as communications by mail have always been. When one places calls, one can of course decide where to direct them; a ban on outgoing obscenity by phone is thus easier to implement in terms of the standards of the target community. But when one is on the receiving end of the telephone, picking and choosing among one's callers can get tricky—especially if one wants to greet them with a pre-recorded message, as the First Amendment of course entitles one to do. Tricky, but not impossible: the technology for blocking access to callers from designated areas—areas in which one's message would be obscene or otherwise illegal—is readily available, and may be deployed at the message-sender's expense if the phone company agrees to provide the blocking or screening capacity for an appropriate price.

If Congress were to require telephone companies to do just that, then prosecuting message-senders who fail to withhold their messages from those communities where the

messages violate constitutionally adequate standards of "obscenity" would replicate federal prosecution of those who deliberately mail films or magazines to places whose obscenity standards those materials violate. But since Congress has *not* required telephone companies to take any such steps, the prosecutions threatened by § 223(b)(1)'s obscenity ban put message-senders to an impermissible choice between muzzling themselves with respect to constitutionally protected messages they wish to make available to callers from places where the messages are both lawful and welcome, and exercising the First Amendment right to make those messages available but virtually inviting criminal prosecution for failing to keep the messages from the ears of people in cities and towns where those messages are properly banned.

Congress had reasonable and less burdensome alternatives to the creation of this double bind; by rejecting those alternatives in favor of a flat criminal prohibition coupled with no requirements on the telephone companies, Congress did to the country in § 223(b)(1)(obscenity) what it did to adults in § 223(b)(2)(indecency): it reduced every community in the nation to hearing over the telephone what the most sensitive communities are prepared to hear. This is "legislation not reasonably restricted to the evil with which it is said to deal." *Butler*, 352 U.S. at 383. Just as government may not quarantine the general public against all the messages that some parents would choose to withhold from their children, so it may not quarantine the country as a whole against all the messages that some communities would choose to withhold from their citizens. The cardinal principle is that the First Amendment cannot countenance conditioning speech on a speaker's willingness to play the role of parent to the most adventuresome youth and the role of guardian for the least tolerant community. To do that is to curtail without sufficient cause "one of those liberties . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler*, 352 U.S. at 384.

I. SECTION 223(b)'S FLAT BAN ON "INDECENT" TELEPHONE COMMUNICATION CANNOT BE RECONCILED WITH THE FREE SPEECH AND DUE PROCESS CLAUSES.

Section 223(b)(2)'s prohibition of "indecent communication for commercial purposes" is unconstitutionally overbroad on its face. It is clear that this provision suppresses a substantial amount of constitutionally protected, non-obscene speech. Nor can it be doubted that § 223(b)(2) is not a mere time, place or manner restriction, but an outright ban on "indecent" speech—an unprecedented and radical expulsion of an entire category of protected expression from an entire communications medium. The Government tacitly concedes that Sable may challenge the indecency ban on its face because "it has not been disputed in this case that Sable also sells indecent speech, or would do so if permitted (especially if prohibited from selling obscene speech)." (GB 20 n.13).[13]

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13. In a later footnote, the Government quixotically attempts to evade Sable's facial challenge to § 223(b)(2)'s ban on "indecent" speech by baldly asserting that outright obscenity (banned by § 223(b)(1)) is the only germane issue, supposedly because "virtually all of Sable's 'frankly sexual' messages not only meet the definition of 'indecent speech' incorporated in § 223(b) but also, taken as a whole, appeal to the prurient interest." (GB 23 n.15). Putting the Government's own aforementioned concession aside, this position cannot be squared with prior rulings of the lower courts in this case. The district court found that Sable's expression "has been 'chilled'—it has 'softened' its messages" out of fear of prosecution under the indecency provision. J.S. (No.88-515) A2. And the Ninth Circuit Court of Appeals found that the possibility of prosecution of Sable under § 223(b)(2) "is more than just a hypothetical threat. The government . . . has specifically declined to agree not to enforce the statute against Sable." *Sable Communications of California, Inc. v. FCC*, 827 F.2d 640, 643 (9th Cir. 1987). That court specifically adverted to the particular criminal penalties which Sable faces under § 223(b)(2), which bans indecent rather than obscene speech. *Id.* at 643-44. Moreover, prosecution under the indecency provision obviously remains a threat even if the same speech could be punished under the obscenity provision, because by proceeding under § 223(b)(2) the Government would avoid the burdens of meeting the far more onerous obscenity standard of *Miller v. California*, 413 U.S. 15 (1973).

A. The Ban On "Indecent" Communication Suppresses A Substantial Amount of Speech Protected By The First Amendment.

There is no dispute that the "indecent" speech suppressed by § 223(b)(2) includes much expression that, by definition, is not obscene, and is therefore protected by the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65-66 (1963). "Indecent but not obscene material . . . qualifies for First Amendment protection whether or not it has serious merit." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C.Cir. 1988). Nor is there any disagreement that § 223(b)'s prohibition of "indecent communication for commercial purposes" is sweeping. According to the Government, the statute bans all "sexually explicit or suggestive messages . . . that are provided for a fee over the telephone." (GB 5).[14] In *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 & n.14 (1978), this Court noted that "the normal definition of 'indecent' . . . refers to nonconformance with accepted standards of morality," and includes the "altogether unbecoming," the "hardly suitable," and the "unseemly" (internal quotation marks omitted). The Government, evidently leery of so obviously unbounded a definition, urges this Court to rule (GB 18) that § 223(b)(2) embodies a congressional design to adopt the FCC standard ultimately employed in *Pacifica*, where "indecent" was defined as "language that describes, in terms patently offensive as measured by contemporary community standards for the . . . medium, sex-

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14. The Government adds that such adult messages are "typically prerecorded" (GB 5), but that is by no means universal nor is it a prerequisite for prosecution under § 223(b). The Government's attempt to exclude live, 2-way communications from the reach of Sable's constitutional challenge, *see* GB 23-24 & n.15, is unavailing. That "persons subject to the restriction can easily distinguish" between pre-recorded and live conversation, *id.*, is irrelevant to the substantiality of § 223(b)(2)'s deterrent effect where, as here, Congress deliberately and conspicuously did *not* distinguish between those two categories, subjecting both to prosecution under the identical statutory proscription. Contrast Congress' distinction between obscene and indecent communications. *See supra* note 12.

ual or excretory activities and organs . . . ." *Id.* at 732. Under this still capacious definition, the Government concedes that material may be criminalized as indecent under § 223(b)(2) and stricken from telephone calls placed by consenting adults even if it *does not*, "taken as a whole, appeal to the prurient interest," and even if it has "serious literary, artistic, political, or scientific value." (GB 18); *Hearings* at 211 (testimony of FCC General Counsel Diane Killory). The challenged statute thus outlaws commercial telephonic communication that "arouses normal sexual responses" in ordinary adults—the very sort of expression that enjoys the protection of the Constitution. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). *See id.* at 505, 507.

As the Second Circuit Court of Appeals held in *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988) (*Carlin III*), *cert. denied*, 109 S.Ct. 305 (1988), § 223(b) is "content based" and therefore subject to "exacting scrutiny." The Court must "determine whether the [statute] precisely furthers a compelling governmental interest. The interest in protecting minors from salacious matter is no doubt quite compelling. Such an interest must be served, however, only by 'narrowly drawn regulations,' that is, by employing means 'closely drawn to avoid unnecessary abridgment.'" *Id.* (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), and *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). The Government nevertheless urges this Court to engage in further content discrimination of its own and to relegate "sexually suggestive messages" to a less robust form of judicial protection than that reserved for what the Government deems to be more worthy subjects of conversation. (GB 24-25). The Government admits (GB 25) that, outside the realm of speech which proposes a commercial transaction,[15] no majority of this Court has *ever* endorsed

15. The Government does not contend that the adult messages at issue here are "commercial speech" in this sense. The messages sold by Sable, like the bestsellers sold by bookstores and the movies exhibited by theatres, are a commercial form of entertainment.

any such proposition. "Entertainment, as well as political and ideological speech, is protected." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).[16] Even when the expression that the state seeks to ban is nothing more exalted than erotic nude dancing in a seedy adult book store, the state's regulation "must be narrowly drawn and must further a sufficiently substantial government interest." *Schad*, 452 U.S. at 68.[17]

Nor can the Government excuse § 223(b)'s sweeping overbreadth by asserting that, in its opinion, Sable's own adult messages may be obscene as well as indecent, and could therefore supposedly be suppressed in any event. In reviewing a time restriction on broadcasts of indecent matter in *Action for Children's Television*, the Court of Appeals for the District of Columbia Circuit ruled that "[s]tatutes or regulations 'that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.' *City of Houston v. Hill*, 107 S.Ct. 2502, 2508 (1987)." 852 F.2d at 1339. Because its claims are "rooted in the First Amendment," Sable is "entitled to rely on the impact" of § 223(b) on the "expressive activities of others as well as [its] own." *Schad*, 452 U.S. at 66. Indeed, it is *only* when a statute would have a "different impact on . . . third parties' interests in free speech than . . . on" the interests of the litigants themselves, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984),

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16. *See also Pacifica*, 438 U.S. at 761 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.").

17. "Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, [this Court] has scrutinized the governmental interest furthered by the regulation and ha[s] stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Schad*, 452 U.S. at 69 n.7.

that a facial overbreadth challenge is needed. *See also id.* at 799-800, 802.

Much more than Sable's dial-it message service is at stake here. Other services providing pre-recorded messages are also threatened by § 223(b)'s ban on "indecent," "unseemly," or "unbecoming" mention of sexual and excretory acts, including "dial-a-joke" services that replay suggestive or scatalogical comedy routines, as well as the hottest new dial-it service—"rap" music messages, in which expletives and vulgar street language are de rigueur.[18] On its face, § 223(b)(2) likewise criminalizes desk-top publishing via the telephone lines of erotica, political satire, humor, poetry, short stories and cartoons that are "sexually explicit or suggestive" (GB 5) or that contain vulgar language and profanity. Commercially motivated telephone "fax" transmissions of a wide range of material constitutionally protected under the standards of the print media—including a copy of this Court's *Pacifica* opinion—could likewise be banned and criminalized, since it is no defense under § 223(b)(2) that the allegedly "indecent" matter has "serious literary, artistic, political or scientific value." (GB 18). All of this material is constitutionally protected, yet all of it falls within the far-ranging prohibition of § 223(b).

In unanimously invalidating a law criminalizing " 'recordings containing . . . immoral, lewd or lascivious language or . . . descriptions,' " *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (quoting Mich.Penal Code § 343), this Court ruled that such a total ban on protected speech could not stand because it "arbitrarily curtails one of those liberties of the individual . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Id.* at 384. The statute under challenge here deserves the same fate.

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18. *See TIME*, March 20, 1989, p. 58.

B. The Total Exclusion Of Protected Speech From An Entire Communications Medium Is Unprecedented And Unconstitutional.

1. *Neither* Pacifica *nor any other case supports § 223(b)'s flat-out ban on indecent speech.*

It comes as no surprise that the Government cannot find a single case sustaining the total exclusion from an entire communications medium of a whole category of protected speech—yet that is precisely what the Government now asks this Court to uphold. Every single decision of which Sable is aware in the areas of telephone, broadcasting, cable-TV, and print has concluded that outright bans on "indecency" violate the First Amendment, even if they are intended to safeguard the well-being of minors.[19]

The Government concedes that *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), "does not by its terms cover the telephone ban at issue here, but would require an extension to reach this case." (GB 22 n.14). That is an amazing understatement. Mere extension of *Pacifica* would not be enough; a wholesale rewrite would be required. In *Pacifica* this Court carefully noted that the FCC "has not unequivocally closed even broadcasting to [indecent] speech," 438 U.S. at 750 n.28; the only requirement was that such material be broadcast at particular hours of the day when unsupervised children were less likely to be in

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19. *See, e.g., Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1586 (1988) (Sneed, J., for the court) ("The First Amendment does not permit a flat-out ban of indecent as opposed to obscene [telephone messages]."); *Carlin III*, 837 F.2d at 558-60 (telephone messages); *Action for Children's Television*, 852 F.2d at 1343 n.18 (broadcasting); *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g* 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F.Supp. 1099, 1106-17 (D.Utah 1985) (cable-TV); *Cruz v. Ferre*, 755 F.2d 1415, 1418-22 (11th Cir. 1985) (cable-TV); *Butler v. Michigan*, 352 U.S. at 383-84 ("immoral, lewd, or lascivious language or descriptions" in print or audio recordings).

the listening audience. *See id.* at 755-56 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment). The Court took pains "to emphasize the narrowness of [its] holding," stressing that it had *not* decided that "this broadcast would justify a criminal prosecution." *Id.* at 750. *See Carlin III*, 837 F.2d at 560 (holding *Pacifica* is no authority for sustaining criminal prosecution under § 223(b)). As a consequence, the decision that the Government would now use to usher in a brave new world of flat-out bans on indecent speech has repeatedly been confined to its facts by this Court and others.[20]

Pacifica thus does not authorize either a blanket ban on indecent speech or criminal prosecution even of broadcasters for offering indecency. Time channeling fully serves the *only* possible legitimate government interest—providing parents with the opportunity to determine whether their children should be exposed to "indecent" speech.[21] That same interest in the telephone context is vindicated by blocking devices, scrambling mechanisms, and access codes.

Moreover, as the *Pacifica* opinion itself makes plain, cases decided in the field of broadcasting cannot readily be applied elsewhere because, as a long settled historical matter, "of all forms of communication, it is broadcasting that has received the most limited First Amendment Protection." 438 U.S. at 748. *See also id.* at 741-42 & n.17. In *Bolger*, this Court declined to apply *Pacifica* to support a ban on potentially offensive unsolicited mailings about condoms because "the special interest of the Federal Government in regulation of the broadcast media does not

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20. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983); *Carlin III*, 837 F.2d at 560.

21. While *Pacifica* also referred to an interest in protecting the adult audience from indecent speech, 438 U.S. at 748-49, this Court has since made clear that there is no government interest in barring adult access to offensive material. *Bolger*, 463 U.S. at 71-72. Contact with Sable's telephone messages is, after all, triggered by the individual, not Sable, and only by deliberately dialing a phone number known to bring into the individual's home an adult-oriented telephone message.

readily translate into a justification for regulation of other means of communication." 463 U.S. at 74.

In accord with this analysis, the Second Circuit concluded in *Carlin III* that "telephone calls made by an individual over a private line differ significantly from the public broadcast in *Pacifica.*" 837 F.2d at 560. Indeed, it has been said that the broadcast media are uniquely pervasive and invasive, "confront[ing] the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *See Pacifica,* 438 U.S. at 748. Someone listening to a radio "is constantly tuning in and out," so not even "prior warnings can[] completely protect the listener . . . from unexpected program content," *Pacifica,* 438 U.S. at 748. *See also id.* at 760 n.2 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment). Even those who regard that view as overdrawn must concede that contact with Sable's telephone messages is initiated by the individual, not by Sable, and only by deliberately dialing a particular sequence of numbers when the individual has made an informed decision to summon an adult telephone message into his home.

Whatever the merits of the analogy posed in *Pacifica,* in this case there is no captive audience accosted by an unsolicited and unwanted "indecent phone call." 438 U.S. at 749.[22] Therefore, the "right to be let alone" cuts sharply *against* § 223(b) and not, as the Government believes (GB 28), in its favor. "If the First Amendment 'means that a state has no business telling a man, sitting alone in his own house what books he may read or what films he may watch,' *Stanley v. Georgia,* 394 U.S. 557, 565 (1969), then

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22. In *Bolger* concerns about exposing minors to supposedly indecent sexual matter were insufficient to prohibit even *unsolicited* mailings of contraceptive pamphlets and advertisements, 463 U.S. at 72, because such mailings were not so "intrusive and uncontrollable" as to warrant a total ban. *Id.* at 74; *accord id.* at 78 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment). *A fortiori,* no ban on *outgoing* telephone calls can be justified here.

it certainly means that the state cannot censor or unreasonably burden the protected speech accessed or engaged in by adults vis-a-vis the telephone." *Fabulous Associates, Inc. v. Penn. Public Utility Comm'n,* 693 F.Supp. 332, 337 (E.D.Pa. 1988).

It is unsurprising, therefore, that until this case came along even the FCC, with respect to "both broadcasting and dial-a-porn services, . . . consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica.*" *Hearings* at 246 (letter of FCC General Counsel Diane Killory).[23] That was the position of the Executive Branch up until now—that is, up until the time that Congress obliterated five years of FCC regulatory fine-tuning by enacting § 223(b)(2)'s flat ban on indecent speech after conducting a few hours of anecdotal hearings. The original and long-standing judgment of the FCC and Justice about the unconstitutionality of banning adult message services such as Sable's was sound. Their new position, forced upon them by precipitous congressional action, is wrong. There is simply no authority for the radical suppression of protected speech which the Government now urges.

> 2. *The Government's "most enterprising minor" standard for justifying an outright ban would reduce adults to hearing and receiving only what is fit for children.*

Bereft of authority for the astonishing contraction of the First Amendment rights it seeks, the Government per-

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23. Indeed, the FCC previously stressed that *Pacifica* "affords this Commission no general prerogative to intervene in any case [involving] words similar or identical to those in *Pacifica*. . . . We intend strictly to observe the narrowness of the *Pacifica* holding." *In re Application of WGBH Educ.Found.*, 69 F.C.C.2d 1250, 1254 (1978), *quoted in Action for Children's Television*, 852 F.2d at 1336. *See also Hearings* at 255 ("any attempts to prohibit consenting adults from receiving indecent but not obscene speech would be unconstitutional") (letter of FCC General Counsel Diane Killory). The Justice Department concurred in the opinion that a flat ban on dial-a-porn would be unconstitutional. *See supra* p. 8.

severes, arguing that a total ban on indecent telephonic communication is nevertheless justified by the "substantial deference" that this Court supposedly owes to the "congressional determination" that no less restrictive alternative "guarantees that some enterprising minors will never hear the messages" offered by Sable and its competitors. (GB 35). Once again the Government asks this Court for a fundamental shift in its jurisprudence, for "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications v. Virginia,* 435 U.S. 829, 843 (1978). *See also Whitney v. California,* 274 U.S. 357, 378-79 (1927) (Brandeis, J., joined by Holmes, J., concurring).[24] In cases such as this, an independent review of the record is in order to ensure that Congress has not overstepped its bounds.

Prior to the legislation challenged here, the FCC had worked out a host of technological and regulatory means of restricting access by minors, as the Government's own recitation of the statutory background makes clear. The Commission had found the requirement of access codes and other procedures "to be both feasible and the least burdensome means of implementing the regulatory mandate" (GB 9), and had "concluded that its new regulations provided the 'most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages.'" (GB 10). Similarly, "the Commission concluded that scrambling would be effective in reducing access to dial-a-porn by minors and could be implemented at reasonable cost." (GB 11). After extensive review, the Second Circuit approved the FCC's proposed security scheme as "a feasible and effective way to serve this compelling state interest." *Carlin III,* 837 F.2d at 555. (GB 12).

Congress did *not* reject these findings of efficacy; it simply raised the standard, lamenting that "[n]o method

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24. The Government's supposedly contrary authorities (GB 35) are inapposite because they were decided outside the special First Amendment context.

guarantees that *some enterprising minors* will *never hear* the messages." (GB 10, 35) (emphasis added). Although the "lesser measures proposed by the FCC in its rulemaking procedings" were "effective," they could not "preclud[e] access by minors *altogether*." (GB 33) (emphasis added). A legislative or administrative judgment that a flat ban on protected speech is the only means of achieving the "*absolute impossibility* of access" to adult message services by "*all* children" (GB 35) (emphasis added) is not entitled to any judicial deference because the impossible standard it sets is anathema to the First Amendment.

The standard heretofore pursued by the FCC in regulating indecent speech was one of reasonableness—was there "a reasonable risk" of exposure to children against the wishes of their parents. *See, e.g., Action for Children's Television,* 852 F.2d at 1335-36, 1341-42. This standard and the record necessary to meet it in any given case have been rigorously policed by the courts. *See id.* Moreover, this was the standard for the FCC time-channeling decision upheld in *Pacifica*—the Commission's decision that "rested entirely on a nuisance rationale," *Pacifica,* 438 U.S. at 750. Much can therefore be learned from an examination of the Government's argument that dial-a-porn is likewise an "attractive nuisance." (GB 29). For that tort doctrine has never required those who own or produce such attractions to ensure that *no* child could *ever* gain access to the nuisance under *any* circumstances. The owner of potentially dangerous property is required only to take reasonable precautions to prevent harm to children. *Prosser & Keeton on Torts* 411 (5th Ed. 1984). There is no requirement that he "make his premises 'childproof.' " *Id.* at 410-411.[25]

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25. *See, e.g., Corcoran v. Village of Libertyville,* 364 N.E.2d 467, 473 (Ill. App. 2d Dist. 1977) ("Whatever may be the status of the attractive nuisance doctrine or its relevancy to this case, the law does not impose on landowners the duty of fencing all bodies of water which are located on their property. . . . And the cases generally give consideration to the practicability and expense of fencing or guarding the source of danger.").

Yet "childproof" is the very standard which the Government now seeks to foist upon a "nuisance" which all agree is protected by the First Amendment. This argument goes too far and proves too much. The compelling state interest here is to "support[] 'parents' claim to authority in their own household,' " *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). The government's task "is not to establish itself as censor but to *assist parents* in controlling the material young children will hear." *Action for Children's Television*, 852 F.2d at 1334 (original emphasis). With its "childproof" standard, the Government exchanges the role of foster father for that of Big Brother.

Because "some enterprising minors" will be able to circumvent the technological barriers required by the FCC or to seek out friends whose parents have allowed access to dial-a-porn services from their homes, the Government insists that the state may ban such communication altogether, thereby reducing the adult population to expression that the state deems fit for children. There is no limiting principle to this argument. The "most enterprising child" standard would justify a complete ban from any medium of communication of virtually all materials that government considers inappropriate for minors.

The Government attempts to distinguish the phone message service at issue here from other communications media by linking its entire analysis to the speaker or message provider's ability to "separate the audience of children from the audience of adults at the point of commercial sale." (GB 33). According to the Government, telephone services are distinctive and deserving of special treatment because, unlike sales of books, magazines, and movie theatre tickets, there is no person sitting behind the cash register or the ticket window to check identification or otherwise determine the age of the buyer when an anonymous and unseen caller rings up dial-a-porn. This supposed limiting principle contains two independently fatal flaws.

First, there is no reason to accept the Government's dubious assumption that a minor capable of electronically bypassing his parents' telephone scrambler or illicitly obtaining a dial-a-porn access code will be unable to fake an ID, slip into an R-rated movie, or buy a copy of *Playboy* magazine.

Second, this "point of commercial sale" distinction is a pure canard because it rests on the patently fallacious assumption that differences in point-of-sale security from one medium to another correlate closely with the governmental interest being asserted—aiding parental ability to protect the morals and psyches of children. Yet it is beyond dispute that any harm to children is posed not by the act of purchasing indecent materials, but by exposure to them. *Cf. Craig v. Boren*, 429 U.S. 190, 204 (1976) (invalidating, for lack of a substantial relationship between ends and means, a law banning the purchase of beer by young males but not banning their consumption of beer once acquired, even if purchased by their same-aged female companions).[26]

Once one recognizes the uncontroversial fact that this is the nature of the harm at stake, it becomes all too clear that the rationale being used by the Government today could justify bans on an endless variety of protected speech that is "indecent," "unseemly," or "sexually suggestive." For even if one could guarantee that R-rated movie videos, sexually explicit bestsellers, cable-TV offerings, and adult magazines would never be directly sold or rented to minors, there will always be myriad secondary access opportunities—a neighbor's video library, a clandestinely circulated pornographic book, magazines "bor-

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26. A simple hypothetical clinches this point. Suppose dial-a-porn services operated by charging customers a flat monthly fee that allowed unlimited access once eligible age had been verified in an initial person-to-person encounter. Although each call to the message service would no longer constitute a "sale" or result in a separate, incremental charge to the caller's telephone account number, the exposure of children who made such non-point-of-sale calls would remain just as harmful.

rowed" from the closet of a friend's father—through which enterprising children will evade purchasing controls and gain indirect access to indecent materials. As one court recently replied to the argument, advanced by the Government here (GB 33 n.22), that even a central blocking system couldn't keep a child from hearing a message at a neighbor's home:

> This scenario, however, is no different from that where minors who are too young to buy porn magazines, still have access to the magazines purchased by their older siblings or parents; the fact that children may have indirect access to such communications provides no adequate justification for placing greater burdens on adults' access to protected speech.

Fabulous Associates, 693 F.Supp. at 339 n.14.

The "most enterprising minor" argument advanced by the Government has in essence already been rejected by this Court. *Butler v. Michigan,* 352 U.S. 380 (1957), confronted a law whose precise goal was to ensure that even the most enterprising child could never be exposed to such materials by banning even secondary transactions—loans, gifts, circulation, exhibition, or the "introduc[tion] into any family, school or place of education"—of any book, magazine, picture, audio recording or other thing containing indecent language or material. *Id.* at 381. By a vote of 9 to 0, the Court gave the back of its hand to the notion that government may "quarantine the general reading public" and "reduce the adult population . . . to reading only what is fit for children." *Id.* at 383. As Justice Frankfurter observed, purging an entire medium of protected speech "not too rugged for grown men and women in order to shield juvenile innocence . . . is to burn the house to roast the pig." *Id.*

3. *The Government's "alternative media" argument would eviscerate the First Amendment because it too contains no limiting principle.*

The Government finds "it . . . significant that § 223(b) is a restriction only on the telephone medium."

(GB 34). On the contrary, what is significant is that the Government can so breezily dismiss the complete censorship of an entire category of protected expression from what is perhaps the single most important, most widely accessible, and most frequently used channel of communication for the American people. A telephone blackout on "sexually explicit or suggestive" speech may not be excused by pointing out that "[a]dults remain free to purchase recordings containing the identical messages at book or record stores." (GB 34). *First*, this argument "is an inadequate response to the fact that [the form of expression] which the [statute] bans is protected by the First Amendment." *Schad*, 452 U.S. at 75 n.17 (rejecting argument that non-live entertainment, presumably in the form of movies, is a constitutionally adequate substitute for the constitutionally protected live nude dancing at issue).

Second, this Court has squarely and repeatedly rejected the Government's "alternative sources" argument. "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Bolger*, 463 U.S. at 69-70 n.18 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *Schad*, 452 U.S. at 76-77. *See also Bolger*, 463 U.S. at 79-80 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).[27]

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27. Of course, as this Court noted in *Bolger*, "the availability of alternative means of communication is relevant to an analysis of 'time, place, and manner' restrictions." 463 U.S. at 70 n.18. Thus, the existence of "reasonable alternative avenues of communication," *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 932 (1986), in the form of alternative sites for adult movie theatres, is relevant to the constitutionality of zoning ordinances that affect the location and concentration of such businesses. *See id.; Young v. American Mini Theatres*, 427 U.S. 50, 62 (1976). Although the *Pacifica* Court did note, in upholding the FCC's power to forbid radio broadcasts of indecent material in the middle of the afternoon, that the recorded comedy routine at issue was available on "tapes and records" as well as in 'theatres and nightclubs," the Court made it clear in the same breath that a total radio ban on indecent speech was not

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Third, the Government's argument admits of no stopping point. If a blanket ban on protected speech in one medium may be upheld so long as another channel of communication remains available, then a category of expression may be booted out of one medium after another—from radio to telephones to bookstores to theatres—until only one medium remains. On the Government's rationale, the sale and distribution of indecent magazines, books and movie videos through the mails could be forbidden—on the ground that minors can easily obtain such items since customers cannot effectively be screened for age (*see* GB 34, 36)—so long as adults could purchase these things in stores. Of course, such a ban would close down subscriptions of *Playboy* and many photography magazines, eliminate trashy bestsellers and racy romance novels from the book club lists, and put an end to the mail-order business in R-rated movie video cassettes. No wonder the Court rejected an "alternative means of access" argument in *Bolger* and denied government the power to purge the mails of material unsuited for minors. Just as the "level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," 463 U.S. at 74, so the range of messages and vocabulary accessible from the private telephone of a consenting adult cannot be

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at issue because the FCC had not closed "even broadcasting to speech of this sort" during other times of the day. 438 U.S. at 750 n.28. The *Pacifica* dictum about tapes and records can hardly be the basis for the alternative media argument advanced here. *See* GB 34. Indeed, this Court has indicated that adult theatre zoning ordinances are unconstitutional if they exclude the films at issue from the city's entire "market." *See Young*, 427 U.S. at 62; *Schad*, 452 U.S. at 71 ("The Court [in *Young*] did not imply that a municipality could ban all adult theatres"); *City of Renton*, 106 S.Ct. at 932 ("the First Amendment requires . . . that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theatre within the city"). If the Government's alternative media argument were sufficient to justify a total ban, then even the total exclusion of adult theatres from an entire city could be upheld so long as the city's residents could rent adult videos or see adult films on cable-TV channels.

limited to that which would be suitable for the public address system of a grade school cafeteria.

C. Section 223(b)(2)'s "Indecency" Standard Is Unconstitutionally Vague.

The requirement that criminal statutes provide "fair warning" of the conduct proscribed is "the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Marks v. United States*, 430 U.S. 188, 195 (1977). This principle has special force where laws impose "criminal penalties" or "threaten[] to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982). In particular, the most important factor affecting the statutory clarity that the Constitution demands is whether the statute "abut[s] upon sensitive areas of basic First Amendment freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).[28] Section 223(b)(2) meets both of these tests for the most rigorous constitutional scrutiny, for it is a criminal prohibition that, beyond merely "abutting upon" the First Amendment, has the suppression of protected speech as its avowed purpose.

The key term of § 223(b)(2), "indecent," is nowhere defined in the statute, but the Government states that Congress understood the word as it was used in *Pacifica* (GB 18); *see Carlin III*, 837 F.2d at 558. Therefore, the Court is told, a commercially motivated telephone message is indecent if it " 'describes, in terms patently offensive as measured by contemporary community standards for the • • • medium, sexual or excretory activities and organs.' " (GB 18) (quoting *Pacifica*, 438 U.S. at 732). Unlike ob-

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28. In a long line of decisions, this Court has taken "special care to insist on fair warning when a statute . . . implicates First Amendment values." *Marks v. United States*, 430 U.S. 188, 196 (1977). *See also Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976) ("Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area pe[illegible]eated by First Amendment interests."); *Smith v. California*, 361 [illegible] 147, 150-51 (1959).

scenity, there is no requirement that indecent language appeal to the prurient interest or lack serious literary, artistic or political value. (GB 18).

The first flaw in this definition of criminal conduct is that it was borrowed, without any reflection, from *Pacifica*, which expressly and repeatedly disavowed approval of the "indecency" standard for purposes of criminal prosecution. 438 U.S. at 750; *id.* at 739 n.13. Indeed, the plurality opinion emphasized the significance of the fact that only a "moderate" civil penalty for broadcast of indecent speech was at stake. *Id.* at 747 n.25. The Government's contrary assertion notwithstanding (GB 19 n.12), it is therefore beyond cavil that the vagueness of this definition of indecency when used in a criminal statute is not only undecided but also gravely in doubt.[29]

The second flaw in the use of the *Pacifica* indecency standard to prosecute telephone expression is that the Court expressly and emphatically limited its approval of the term to the specific broadcast medium at issue, and warned that this indecency test and analysis would be inappropriate with respect to other media of communications in other contexts. 438 U.S. at 750. *See supra* pp. 21-23.[30] Indeed, the Court stressed the unique character of the broadcast medium as the primary reason for "the narrowness" of its holding. 438 U.S. at 748-50.

The FCC admitted in *Pacifica* that defining "indecency" had theretofore been a frustrating struggle and that the term had never been authoritatively construed.[31] The Court of Appeals for the District of Columbia Circuit

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29. *Action for Children's Television*, in which the District of Columbia Circuit ruled that *Pacifica* foreclosed a vagueness challenge to the indecency ban, 852 F.2d at 1338-39, likewise involved only administrative broadcast channeling rather than criminal prosecution.

30. In quoting the *Pacifica* indecency defintion (GB 18), the Government omits the phrase in which this Court tied the issue of indecency to "contemporary community standards *for the broadcast medium.*" 438 U.S. at 732 (emphasis added).

31. Brief for Petitioner in *Pacifica* at 22.

found itself unable to pin down the term and held the FCC's ban on indecency unconstitutionally vague. *Pacifica Foundation v. FCC*, 556 F.2d 9, 16-17 (D.C.Cir. 1977). No further clarification was forthcoming in that litigation because, at the urging of the FCC,[32] this Court refused to endorse or even to address application of the indecency definition—even *within* the broadcast medium—to any circumstances other than those presented by the particular case before the Court. *See Pacifica*, 438 U.S. at 750. The upshot is that all anyone really knows about "indecency" under § 223(b)(2) is that it applies to George Carlin's "Seven Dirty Words" monologue.[33]

The *Pacifica* indecency standard—and therefore § 223 (b)(2)'s standard as well—is a chimerical thing. Its meaning flows from a "nuisance rationale under which context is all-important. The concept requires a host of variables." *Pacifica*, 438 U.S. at 750. Among those variables are the content of the message in which the allegedly indecent language is used and the nature of the audience. *Id.* at 731-32, 750. " 'The governing idea is that 'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct.' " *Id.* at 732 n.6 (quoting

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32. The FCC devoted much energy to convincing this Court that it need not pass on the constitutionality of the generic definition because the Commission had addressed only the limited question of whether the particular broadcast was indecent. *See* Brief for Petitioner at 41-48, *in FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

33. Indeed, the FCC itself was sufficiently uncertain about what it thought the term meant that for a decade it limited application of the *Pacifica* standard to material similar to the Carlin monologue. *See, e.g., Pacifica Foundation*, 95 F.C.C.2d 750, 753-61 (1983) (finding use of several of "seven dirty words" not to be indecent); *WGBH Educ.Foundation*, 69 F.C.C.2d 1250, 1251 (1978) (finding not to be indecent television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, pro.anity, and sacrilege"). The Commission has since announced that it will apply a dramatically broader, but unspecified, understanding of "indecency" in regulating both broadcasts and telephone communications. *See Infinity Broadcasting Corp. of Penn.*, 3 FCC Rcd 930 (1987); *Hearings* at 211 (statement of FCC General Counsel Diane Killory).

concurring statement of FCC Commissioners Robinson and Hooks).

All of this adds up to the fact that § 223(b)(2)'s test for what constitutes criminal "indecent communication" is afflicted with two fundamental infirmities. *First,* the standard of conduct remains vague because no branch of the federal government has been willing to take responsibility for figuring it out. Congress provided no definition for the term; it simply referred all queries to *Pacifica.* But the *Pacifica* Court declined to address the Court of Appeals' ruling that the standard was impermissibly vague and declined to ferret out a definition; for the future, the FCC was directed to consider a wide variety of inherently fluctuating factors in continuing to make similarly isolated, ad hoc, context-bound judgments. For its part, the FCC shrank from the task of actually defining the term and simply shrugged, saying that "it all depends." This makes the "I know it when I see it" standard seem concrete by comparison.

A criminal prohibition violates due process if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally,* 269 U.S. at 391. Such guessing is unavoidable with respect to § 223(b)(2) because the federal government has refused to offer any guidance. Sable and its officers do not expect the government to "exercise their editorial judgment for them," *Infinity Broadcasting Corp. of Penn.,* 3 FCC Rcd 930, 932 (1987), but a clue as to what will next be deemed criminally indecent in which context would be appreciated. Indeed, the Due Process Clause requires much more than a clue. Under *Miller v. California,* obscenity may be outlawed only if the proscribed " 'hard core' sexual conduct [is] specifically defined by the regulating state law as written or construed." 413 U.S. at 27. "[S]pecific prerequisites" for what constitutes obscenity were held to be essential to "fair notice." *Id.* No less is essential when the law's target is the far wider one of all "indecency."

Second, because the statute incorporates the *Pacifica* "standard," the meaning of 223(b)(2) criminal indecency is destined to remain ad hoc, contingent, and inconsistent. For example, the Government states that the question of indecency involves no assessment of whether the speech, taken as a whole, appeals to the prurient interest or whether it has significant literary or artistic value (GB 18), yet in *Pacifica* the FCC stated that such value might prevent speech from being held indecent in some contexts, 438 U.S. at 732 nn. 5 & 6, and the Commission continues to treat such value as one of the variables, although it has refused to define the role of this factor in its multivariable indecency analysis.[34] Such conflicting signals with respect to criminal statutory commands deny fair warning and cannot be given legal effect. *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952).

Even more disturbing is the contingent role of the audience in determining whether particular expression is indecent. The composition of the audience and the risk that it would include particular age groups of minors were of central importance to the FCC and the Court in *Pacifica*. The make-up of the potential audience for a given broadcast in a given community, as determined from demographic studies and statistical forecasts, continues to play a pivotal role in FCC enforcement of the ban on broadcast indecency, *see, e.g., Action for Children's Television*, 852 F.2d at 1341-42, which of course employs the same standard that is now to be applied under § 223(b)(2). Even in cases involving discrete radio broadcasts to a single local community, the FCC's findings on audience composition and the risk of exposure to minors have been rejected as "more ritual than real." *Id.* at 1341. With respect to criminal prosecution of telephone messages on a *national* network under § 223(b)(2), the complexity and uncertainty of the audience component of the indecency standard mount exponentially. If the FCC cannot anal-

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34. *See Infinity Broadcasting*, 3 FCC Rcd at 932.

yze such factors in assessing indecency to the satisfaction of the federal courts, it is absurd to demand that individual message providers do so under threat of criminal penalty. When such inherently indeterminate assessments are made the basis of regulatory policy, it is—to say the least—unfortunate. When they are made the basis of criminal prosecution, it is unconstitutional.

II. SECTION 223(b)'s PROHIBITION OF "OBSCENE" TELEPHONE COMMUNICATION LIKEWISE VIOLATES THE FREE SPEECH AND DUE PROCESS RIGHTS OF ALL WHOSE MESSAGES ARE "OBSCENE" ONLY BY THE STANDARDS OF COMMUNITIES THEY DO NOT SEEK TO REACH.

A. When It Enacted § 223(b)(1), Congress Created A Double Bind For Those Who Wish To Make Frankly Sexual Messages Available Only To Callers From Communities Where Those Messages Would Be Acceptable And Are Constitutionally Protected.

The Government's facile equation of the ban on obscene *telephone* communication with bans on transmitting obscenity by *mail, radio,* or *television* (GB 40) might make sense as to individuals or firms making *out*going obscene phone calls, since they can decide which communities to reach with which messages and can thus readily avoid sending problematic messages to places where, in accord with *Miller v. California,* 413 U.S. at 30-32, 36-37, those messages would be deemed obscene. But the Government's equation makes no sense at all as to those parties which, like Sable, do not *place* calls but merely *receive* them, and play pre-recorded messages to those who call. For, although such parties may purchase telephone lines to communicate their message, they are denied control over who may choose to call those lines. They are entirely dependent upon the local telephone companies, or "local exchange carriers" (LECs), whose lines they must use: they can *ask* LECs to offer, at the senders' own expense, existing message-blocking technology that would allow the senders to

bar designated areas of the country from accessing their lines. They can ask—but the LECs may just say no.

For example, Sable obtained a "Dial-it" telephone line from the LEC for its area, Pacific Bell, for the purpose of receiving calls from adults in Los Angeles. Despite Sable's request, Pacific Bell has not made available the option of screening out calls originating from other areas. On the contrary, even though Sable does not presently wish to communicate with persons in other states (quite apart from the existence of § 223(b)), Pacific Bell gives out-of-state callers access to Sable's message line and keeps all the revenue from this service, sharing none with Sable; Sable receives a portion of Pacific Bell's billings *only* on calls originating in-state. Federal law leaves Sable with no way to answer calls from communities that consider its messages entirely acceptable without involuntarily playing identical messages to communities where those messages might be deemed obscene. Hence the double bind: either refrain from speaking to Los Angeles listeners despite the acceptance of such messages in their community, or communicate those protected messages to them and risk prosecution in some locale where the same messages are "obscene."

While conceding that, for this reason, companies like Sable "may feel compelled to tailor their messages to the least tolerant community" (GB 21) for fear of criminal prosecution, the Government sees no constitutional infirmity in a statute that thereby forces speakers to refrain from communicating messages that are legally protected as to some areas of the country, for fear that callers from other areas of the country will trigger obscenity prosecutions. The Government simply disclaims all responsibility for this stifling of protected messages, treating it as "the inevitable consequence of the inherently national character of the telephone network" (GB 21; *see also* GB 36-38), and insisting that "[t]hose who choose to furnish potentially obscene messages in communities across the nation must be prepared to comply with the standards of each of those communities." (GB 21-22). To the Government, "Sable's

predicament is [but] the inevitable consequence of a decision to enter a business that uses a telephone network that is inherently national in reach." (GB 42).

Sable's predicament is anything *but* "inevitable." Its inability to play adult messages to consenting callers *from areas where those messages are not obscene*, for fear of later being prosecuted based on calls placed from other, less tolerant communities, has obviously been created by Congress' refusal to follow its constitutional obligation to regulate speech only in the least restrictive manner. For Congress has unquestionable power to require the LECs to make available to message senders like Sable, at the message senders' expense, the technological means of screening out long-distance calls from areas that the particular message sender chooses not to serve. This would completely satisfy the Government's asserted interest while limiting the ban on "obscene" message transmissions to those message senders who fail to utilize screening methods, made available to them at their expense, to avoid violating any locality's obscenity standard.

By *not* requiring the LECs to make such screening available and *not* limiting the federal ban contained in § 223(b)(1) to such failure-to-utilize situations, Congress deliberately chose a gratuitously sweeping prohibition. Eschewing the less restrictive alternative clearly open to it, Congress needlessly mandated that, as a condition of unhampered use of the interstate telephone system, Sable and companies like it must give up in advance the right to communicate certain protected messages to willing listeners for fear that those messages will also reach, but will later be held to violate the standards of, less tolerant communities.

B. Putting Message Senders In This Predicament Imposes An Unconstitutional Condition On Their Use of Telephone Lines For Protected Speech.

1. *Enacting § 223(b)(1) without requiring telephone companies to offer existing technologies for screening out unwanted calls abridges freedom of speech.*

Section 223(b)(1) creates constitutional problems implicating both free speech and due process because of the way it *interacts* with the surrounding legal terrain. It is instructive to compare this case with one arising out of a governmentally induced decision by an LEC to deny service to an adult message sender with respect to messages not yet adjudicated to be obscene. There, the Ninth Circuit properly held that denial to be "an unlawful prior restraint." *Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (Sneed, J.), *cert. denied*, 108 S. Ct. 1586 (1988); *cf. Fort Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, 4184-86 (Feb. 21, 1989). What Congress did here similarly, if less obviously, operates as a prior restraint upon messages never adjudicated to be obscene—because Congress enacted § 223(b)(1) in a legal context where it left LECs legally free to expose speakers like Sable to listeners they have no wish to address. It is as though the Government said: "We will not enjoin (or induce the phone company to suppress) your protected speech, but we will compel you either to suppress it yourself or to *accompany* it—unless you convince your local telephone company to change its policy—with speech in which you do not wish to engage, which you know to be unprotected, and for which you will be federally prosecuted."[35]

Whether or not § 223(b) is thus conceptualized as creating a prior restraint, it does at the very least impose

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35. Perhaps the telephone company's policy of denying Sable screening technology is not *itself* "state action," *see Carlin Communications, supra*, 827 F.2d at 1297; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (ruling that heavily regulated public utility with a partial monopoly was not a state actor and thus did not have to accord "due process" when terminating electricity). But Sable is not challenging the telephone company's policy here; it is challenging Congress' enactment of § 223(b)'s criminal prohibition, against a legal background in which telephone companies have been left with discretion over how much of the technology available for message-blocking they may withhold and how much they may deign to make available.

a needlessly onerous burden on a message sender's privilege of using the telephone to transmit messages free of the threat of federal prosecution: it may do so only if it is willing, upon the phone company's insistence, to give up its right to transmit to certain areas of the country messages that are protected by the First Amendment as non-obscene in those areas. Special justification is needed whenever government would force someone to sacrifice a constitutional right as a condition of access to a valued public privilege. *See, e.g., Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963). No such justification exists here. *See* II-B-2, *infra*.

Moreover, access to telephone service as a channel for communicating in the modern world is far more than a simple "privilege"; the Government's own description of telephone access as a virtually universal necessity (GB 27) shows the opposite. In contrast to government's broad power over the broadcast medium, *see supra* pp. 22-23, government has no right to maintain tight control over who may use telephones, or to force users to accept whatever risks government chooses to attach to such telephone use. Yet the Government sees no problem in confronting Sable with a take-it-or-leave-it package, under which Sable's decision to use the telephone system to transmit non-obscene adult messages necessarily exposes it, whenever the local telephone company so decrees, to being heard by people it would not choose to address, thereby subjecting itself to criminal prosecution for the content of what it is communicating.[36]

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36. Even if it were permissible for a government agency itself to put Sable to such a choice, this Court made clear in *Bell v. Burson*, 402 U.S. 535, 535-39 (1971), that government may not leave in the hands of a *private party* the power to condition access to an important public privilege—in that case to condition a driver's right to retain a valid driver's license on payment of a sum of money, as security, discretionarily set by any person suing the driver for alleged injuries. *Compare New Motor Ve-*

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Among other problems with this scheme, the First Amendment surely forbids forcing a private firm, at the discretion of other private parties, to engage in speech it would rather avoid. In *Pacific Gas and Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), this Court invalidated a forced-speech requirement even though the conduct that made it necessary for the utility to convey a message it did not wish to convey was the utility's mailing of bills to customers—"commercial speech," at best. The invalidity of the forced-speech requirement in our case is considerably clearer, because the requirement is triggered here by the *content* of the sender's message, *contrast id.* at 31 (Rehnquist, J., joined by White and Stevens, JJ., dissenting), and because the sending of sexually explicit messages for money involves the exercise of fully protected (even if relatively less valued) speech, *not* just "commercial speech."

The criminal context of this case makes the constitutional problem even more severe than in *Pacific Gas and Electric.* Consider *Katz v. United States*, 389 U.S. 347, 352 (1967), where this Court held that, given "the vital role that the public telephone has come to play in private communication," government cannot require that those who use it expose themselves to the risk of speaking unwittingly to an "uninvited ear" and thereby subject themselves to prosecution for what they said—the risk that the "words [they] utter[] into the mouthpiece will . . . be broadcast to the world," *id.* at 352, and will thus be

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hicle Board v. Fox, 439 U.S. 96, 108-09 (1978) (holding it permissible for a state to permit a private party to trigger a *governmental inquiry*, with full procedural protections, into the activities of potential business competitors); *but see id.* at 115, 126 (Stevens, J., dissenting) (finding even this limited triggering delegation invalid on the ground that it involved a "unique and arbitrary process" that "grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been violated or is about to be violated" and thereby results in "the unconstitutional exercise of uncontrolled government power").

usable as evidence against them. If the Government is right in its present position, then *Katz* was wrong. For plainly the defendant in that case did not *have* to use a telephone to place illegal bets; by choosing to use a telephone, he exposed himself to the risk that government's uninvited ear would be listening in and that he might be prosecuted on the basis of what the government overheard. But this Court was surely right in *Katz* when it ruled that, given the indispensable nature of telephonic communication, this is not a risk to which government may justifiably expose those who would use the telephone to conduct their affairs.

2. This curtailment of free speech serves no legitimate purpose.

The legislative history of § 223(b) and its predecessors suggests no purpose for subjecting message senders to this double bind. There is no evidence that Congress, in passing § 223(b) without mandating that the LECs provide screening technology, ever thought about the pros and cons of subjecting the senders and recipients of adult messages to this kind of arbitrary power by private monopolists to enforce sweeping, content-based conditions on another private party's access to communication facilities.

Indeed, it is hard even to conjure a rational purpose—much less a compelling justification—for the resulting crazy-quilt pattern of censorship. Certainly the legal regime described above cannot be justified as advancing each community's interest in setting its own standards of offensiveness and prurience in the explicit description of sex to people in that community. Even if Pacific Bell, as regulated by the California Public Utilities Commission, could serve as surrogate for a Los Angeles jury, its denial of screening capacity would occur in advance of any obscenity adjudication. Moreover, it obviously could not represent any of the large number of other communities (Las Vegas, for instance) whose relatively tolerant standards Sable might hope to meet with its messages, or any of the communities at the less-tolerant end of the spectrum, which might want to exclude Sable's messages.

In this sense, § 223(b), coupled with the absence of any federal obligation on the part of LECs to provide screening for long-distance calls, seriously undermines the *Miller* principle of community control over sexually explicit materials. For when every message sender is pressured to comply with a "least tolerant community" standard, many metropolitan areas are necessarily denied access to messages that adults living there wish to receive and do ***not*** regard as obscene.[37]

C. Unless All Local Exchange Carriers Provide Geographically Based Message-Blocking, § 223(b)(1) Will Impose a Single "National" Obscenity Standard for Determining What Can Be Transmitted Over Telephone Lines, in Direct Conflict With Miller v. California.

One systemic consequence of this legal regime is that, unless and until all of the LECs choose to provide message senders with the ability to channel their telephone messages at the senders' expense to the communities they wish to address, § 223(b) will necessarily impose on many message-senders a single standard for obscenity and will thereby strip communities throughout the nation of their right to determine, within First Amendment limits, what sorts of adult material should be available to their citizens.

In *Miller v. California*, 413 U.S. 15, 30-32 (1973), this Court noted the absence of a national consensus on what appeals to the prurient interest and is patently offensive,

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37. Nor does Congress' coupling of § 223(b) with LEC freedom to deny screening bear any relation to the interest a community might claim in combatting the effects of the local production of sexually explicit materials—for example, by protecting children within that community from being exploited in the *production* of sexually explicit materials, *see New York v. Ferber*, 458 U.S. 747 (1982), or by protecting women from similar forms of exploitation, *cf. Hudnut v. American Booksellers Assoc.*, 771 F.2d 323 (7th Cir.), *aff'd*, 106 S.Ct. 1172 (1986). It has not even been suggested that interests of that sort are involved in the message-sending at stake in this case or that such concerns are in any way embodied in the statute.

and rejected the theory that "obscenity" is to be determined on any such basis: "[W]e . . . hold that obscenity is to be determined by applying 'contemporary community standards,' . . . not 'national standards'." *Id.* at 36-37 (citations omitted). Failing to take such a view would gravely undermine local control in this area. *Miller* noted that a national standard would create an intolerable risk of suppression by "necessarily impl[ying] that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Id.* at 32 n.13. It also rejected the effect of such an approach on less tolerant communities: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32.

In citing the *Miller* local community standard in its deliberations on § 223(b), Congress appears to have assumed that the statute would be enforced in federal district courts using each district's community standard.[38] But so long as some LECs withhold geographical targeting capacity, this sort of enforcement necessarily has the effect—as the Government admits—of imposing a "least tolerant community" standard that deprives many of the nation's communities of the right to receive materials deemed acceptable there simply because the materials are unacceptable elsewhere.

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38. The lower federal courts have uniformly interpreted anti-obscenity legislation to embody a local community standard. *See, e.g., Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1362-63 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980) (applying community standards to determine whether material is obscene in light of the Supreme Court's "reject[ion] . . . [of] a uniform national standard" in *Miller*); *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984) (requiring application of community standards to the determination of obscenity); *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 135 (2d Cir. 1983) (stating that "a work . . . will not be deemed obscene unless it is patently offensive according to contemporary community standards").

To be sure, one might imagine alternative "national" tests. One could adopt a "*most* tolerant community" standard, under which a message would be deemed legal under § 223(b) if acceptable in *any* community in the nation. That would have the virtue, at least, of ensuring that the statute cut off no protected speech that Sable and other message providers wish to convey to willing adult listeners. But despite the Government's attribution to Sable of a preference for such a standard (GB 42), such an approach would be all but impossible to implement and would clash with *Miller* by displacing the right of less tolerant communities to set appropriate moral standards and protect their citizens through the criminal law.

The alternative the Government evidently favors, "an average or prevalent national standard" (GB 37), would ensure the worst of both worlds. For under such a standard, the most tolerant communities would be unable to obtain many of the messages that their adult residents find acceptable and wish to hear, while the least tolerant communities would be unable to exclude messages they regard as unacceptably offensive and prurient. In any event, setting such a standard would involve making substantial judgments of morality and prudence in weighing values of federalism and free speech—policy choices that would, at the very least, have to be clearly articulated and implemented by *Congress*, not by the Judiciary: "[T]he Constitution has entrusted to Congress, and not to [any court], the task of striking [such a] balance," especially where doing so would require the Court "not merely to strike out words, but to insert words that are not now in the statute." *Marchetti v. United States*, 390 U.S. 39, 60 & n.18 (1968).[39] It is completely fanciful for the Government to

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39. To the extent that this Court were, despite these concerns, to formulate obscenity standards in a new way in accord with the Government's suggestion of what might be sensible, such a determination could not justify criminal prosecution for conduct that occurred prior to the Court's opinion on this matter. *See Marks v. United States*, 430 U.S. 188, 196 (1977) (holding that due process precludes the retroactive application of new standards for obscenity).

suggest that Congress has already made these tradeoffs; every indication is to the contrary.

CONCLUSION

For the reasons stated above, the judgment in No.88-515, upholding § 223(b)(1)'s obscenity provision, should be reversed, and the judgment in No.88-525, invalidating the indecency ban in § 223(b)(2), should be affirmed.

Respectfully submitted,

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